

LYNN BROWN,)
)
 Plaintiff)
)
 v.) **Civil No. 93-292 B**
)
 DONNA E. SHALALA,)
 Secretary of Health)
 and Human Services,)
)
 Defendant)

This Social Security Disability appeal raises the question whether substantial evidence supports the Secretary's decision that the plaintiff was not under a disability prior to the expiration of her insured status in December 1989. Specifically, the plaintiff asserts that the Administrative Law Judge erred in holding that she could perform sedentary work before her date last insured despite her worsening arthritic condition.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since December 5, 1986, Finding 2, Record p. 20; that she met disability insured status requirements as of that date, but continued to meet those requirements only through December 31,

¹ This action is properly brought under 42 U.S.C. 405(g). The Secretary has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 26, which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the Secretary's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on May 20, 1994 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

1989, Finding 1, Record p. 20; that she does not suffer from any impairment or combination of impairments that meets or equals any listed in Appendix 1 to Subpart P, 20 C.F.R. 404 (the "Listings"), Finding 3, Record pp. 20-21; that prior to the expiration of her insured status she was unable to perform her past relevant work as a sales clerk, Finding 6, Record p. 21; that before her date last insured she "lacked the residual functional capacity to lift more than 10 pounds, perform any strenuous activities and stand or walk for prolonged periods," Finding 5, Record p. 21; that her "assertions concerning her impairments and their impact on her ability to work at the time her insured status expired are not entirely credible in light of her own description of her activities, and discrepancies between her assertions and the information contained in the documentary reports," Finding 4, Record p. 21; that, based on an exertional capacity for sedentary work, her age (43), education (limited) and vocational background (semi-skilled), application of Rules 201.19 and 201.25 of Appendix 2, Subpart P, 20 C.F.R. 404 (the "Grid"), directs a conclusion that she was not disabled at any time through December 31, 1989, Findings 7-11, Record p. 21. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Secretary. 20 C.F.R. 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. 405(g); *Lizotte v. Secretary of Health & Human Servs.*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Because the Secretary determined that the plaintiff is not capable of performing her past relevant work, the burden of proof shifted to the Secretary at Step Five of the evaluative process to show the plaintiff's ability to do other work in the national economy. 20 C.F.R. 404.1520(f);

Bowen v. Yuckert, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence supporting the Secretary's findings regarding both the plaintiff's residual functional capacity and the relevant vocational factors affecting her ability to perform other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

There is no dispute that the plaintiff, now age fifty, is presently disabled due to the progressive worsening of rheumatoid arthritis in her knees. Record pp. 29, 88, 158-59. Regardless of the seriousness of her present condition, however, the plaintiff is not entitled to disability benefits unless her disability existed prior to the expiration of her insured status. *Cruz Rivera v. Secretary of Health & Human Servs.*, 818 F.2d 96, 97 (1st Cir. 1986), *cert. denied*, 479 U.S. 1042 (1987). Evidence of an impairment that reached a disabling level of severity after the date last insured, or that was exacerbated after this date, cannot be the basis for a disability determination, even though the impairment may have had its roots prior to the date on which insured status expired. *Deblois v. Secretary of Health & Human Servs.*, 686 F.2d 76, 79 (1st Cir. 1982); *Flint v. Sullivan*, 743 F. Supp. 777, 783 (D. Kan. 1990), *aff'd*, 951 F.2d 264 (10th Cir. 1991). The central question for this appeal, therefore, is whether the plaintiff's condition was severe enough as of December 31, 1989, her date last insured, to prevent her from performing sedentary work. I find that the record contains substantial evidence to support the Administrative Law Judge's decision that it was not.

The Administrative Law Judge found that the plaintiff was suffering from arthritis of both knees and the residual effects of a right broken foot at the time her insured status expired. Record p. 16. The foot injury resulted from a December 11, 1986 car accident. *Id.* at 137. X-rays revealed a fractured heel bone. *Id.* The fracture was also accompanied by some tendon damage *Id.* She was placed in a cast, put on crutches and then started on a physical therapy regimen. *Id.* at 188-89. The notes of her physical therapist, S. Shanley, R.P.T., indicate that over the course of the therapy

the plaintiff exhibited a significant decrease in pain and an increase in functioning. *See id.* at 128-33. Her treating physician, R. Scott Oliver, M.D., noted on May 12, 1987 that she seemed to be doing "remarkably well." *Id.* at 189. The plaintiff testified that a year after the break her condition plateaued. *Id.* at 47-48. Though she was left with a limp and continued to have some residual pain, her foot injury had mostly resolved by the middle of 1988. *Id.* at 137-39, 148. Indeed, the plaintiff's attorney conceded as much at the administrative hearing. *Id.* at 29-31.

On November 17, 1989, less than two months before her insured status expired, the plaintiff started complaining of a new problem, that is, soreness in her knees. *Id.* at 143. She stated that the soreness had developed about four to five months previously. *Id.* She was initially diagnosed with probable degenerative arthritis. *Id.* at 142. A month later, December 18, 1989, the plaintiff reported that her knee condition had worsened. *Id.* She was referred to a rheumatologist, Geoffrey M. Gratwick, M.D., whom she first visited on January 16, 1990, two weeks after the expiration of her insured status. *Id.* Dr. Gratwick diagnosed her as having "polyarthritis of unknown etiology," possibly early connective tissue disease or early rheumatoid arthritis. *Id.* at 149. Her knee condition fluctuated over the course of the following year and a half of treatment, sometimes showing improvement, other times showing deterioration. *Id.* at 150-53. Starting in February 1992, however, her condition began to worsen significantly. *Id.* at 153-54. By April 27, 1992 Dr. Gratwick concluded that her symptoms had reached a point where they "now preclude gainful employment." *Id.* at 147.

Based on this medical evidence, the Administrative Law Judge concluded that, as of December 31, 1989, the plaintiff was suffering from the residuals of a broken foot and the beginnings of deteriorating rheumatoid arthritis. Record p. 16. Assessing these impairments as of the expiration of her insured status, the Administrative Law Judge concluded that the plaintiff retained the residual functional capacity to perform sedentary work prior to December 31, 1989. *Id.* at 17-19. Applying the Grid, the Administrative Law Judge then concluded that the plaintiff was

not under a disability as of the time her insured status expired. *Id.* at 20.

The plaintiff first faults the Administrative Law Judge with failing to consider the increasing symptomology from her arthritis that existed before the expiration of her insured status when evaluating the impact of her arthritis on her ability to work. Specifically, she claims that the Administrative Law Judge erred in determining that her arthritis was not disabling as of the end of 1989.

I find that this argument is without merit. The medical record establishes that the plaintiff first exhibited signs of arthritis at the earliest in the spring of 1989. Record p. 147, 148. The medical record also establishes that this condition eased throughout the summer of 1989 and then flared up again in October 1989. *Id.* at 148. The plaintiff did not need to seek medical treatment for this condition, however, until November 17, 1989. *Id.* at 143. Medication relieved her pain but had to be stopped due to stomach problems. *Id.* at 142. She then reported her condition worsening on December 18, 1989, just two weeksc

before the expiration of her insured status. *Id.* Her next medical treatment for this worsening condition, and her first with a specialist, did not occur until January 16, 1990, two weeks after her insured status expired. *Id.* at 1, 148-49. Over the next year and a half her condition continually fluctuated, periodically showing signs of marked improvement. *Id.* at 149-53. Indeed, as of February 12, 1990, Dr. Gratwick, the plaintiff's treating physician, reported that she was doing ``quite nicely." *Id.* at 150. And by January 9, 1991 the plaintiff was reportedly doing ``really very nicely," with some basic aching that was not particularly troublesome to her. *Id.* at 152. According to the medical records, her condition did not start to deteriorate to its present state until February 1992, nine months from her previous visit to Dr. Gratwick and over two years after the expiration of her insured status. *Id.* at 153.

When evaluating the plaintiff's ability to perform work, the Administrative Law Judge determined that the plaintiff's knee condition was not significantly incapacitating as of December

31, 1989. Record pp. 17-19. This was a proper conclusion on the medical record before him. *See* 20 C.F.R. 404.1545(e). Based on the evidence just recounted, the Administrative Law Judge could fairly conclude that the plaintiff's rheumatoid arthritis was merely in its beginning stages at the expiration of her insured status and had not yet reached a disabling level of severity. *Deblois*, 686 F.2d at 79. Because this conclusion is a fair reading of the medical evidence, it must be upheld. *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The plaintiff next contends that positive evidence does not support the Administrative Law Judge's determination that she retained the residual functional capacity to perform sedentary work before the close of 1989. I disagree. The Administrative Law Judge assessed the plaintiff's residual functional capacity in light of her impairments then existing at the end of 1989, that is, the residuals of a broken foot and the beginnings of rheumatoid arthritis. The record is replete with evidence, both medical and testimonial, that the plaintiff could perform the rather modest demands of sedentary work given these specific impairments as of the time her insured status expired.

Sedentary work, as the phrase obviously denotes, predominately requires the ability to sit. 20 C.F.R. 404.1567(a). Specifically, it requires a capacity to sit for about six hours and to walk or stand for about two hours out of an eight-hour workday, as well as the ability to lift no more than ten pounds. *Id.*; Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service*, at 29 (1992). The plaintiff emphatically stated at the administrative hearing that she had no limitations in her sitting ability, the chief component of sedentary work, at any point from 1986 through 1989. Record p. 39, 40. The medical record also indicates an unlimited sitting ability around this time. *Id.* at 138. Indeed, the plaintiff's rheumatologist, Dr. Gratwick, reported on June 6, 1990 that the plaintiff could work at a job which was "primarily sedentary." *Id.* at 151. Furthermore, as the Administrative Law Judge specifically noted, the plaintiff does not suffer from any type of impairment, such as a back injury, that would likely affect her ability to sit. *Id.* at 18.

As for lifting, standing and walking, the medical evidence and the plaintiff's own

admissions suggest that her functional abilities sufficed to meet the minimal requirements for those activities by the close of 1989. On July 27, 1988, Carl W. Irwin, M.D., an examining physician, recounted that the plaintiff, despite a limp, could walk for about one hour and stand for about fifteen minutes at a time. *Id.* at 137-38. In her disability report, submitted on June 27, 1988, the plaintiff stated that she had no limitations in performing household maintenance, including cooking, cleaning, shopping and odd jobs around the house. *Id.* at 69. A written residual functional assessment completed by a nontestifying, nonexamining physician on August 8, 1988 concluded that the plaintiff retained all the physical requirements to perform sedentary work. *Id.* at 60-63. The Administrative Law Judge recognized, however, that the plaintiff continued to walk with a limp and thus would likely have been incapable of "standing or walking for prolonged or uninterrupted periods of time." *Id.* at 17. Prolonged or uninterrupted standing or walking is unnecessary for the performance of sedentary work, however. *See* 20 C.F.R. 404.1567(a); Social Security Ruling 83-10 at 29.

I note that direct evidence relating to the plaintiff's standing, walking and lifting abilities before her date last insured comes from 1988 and therefore does not consider her arthritic knee condition that emerged at some point in 1989. Nevertheless, evidence of her abilities existing after 1989, when her knee condition started worsening, indicate that she could easily meet the slight standing, walking and lifting requirements of sedentary work as of the end of 1989, when her knee condition was only in its early stages. For example, on March 16, 1992, over two years after the crucial time period, the plaintiff reported that she could still do some light housekeeping, cooking, driving and shopping. *Id.* at 98. She also reported that her doctor had limited her walking and standing to no more than fifteen minutes at a time and her lifting to no more than ten pounds. *Id.* Fifteen minute periods of standing or walking, interposed with longer periods of sitting, is sufficient to meet the demands of sedentary work, as is the ability to lift only ten pounds. *See* 20 C.F.R. 404.1567(a); Social Security Ruling 83-10 at 29. In addition, two further written residual

functional capacity assessments were completed in 1992 by nonexamining physicians. *Id.* at 109-116 (November 5, 1992), 117-23 (June 23, 1992). Each of these assessments determined that the plaintiff could then meet all the standing, walking and lifting requirements of sedentary work. *Id.* at 110, 118.

Taken together, this evidence provides substantial, positive support for the Administrative Law Judge's conclusion that the plaintiff could satisfy the slight standing, walking and lifting demands of sedentary work as of December 31, 1989. *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990). Given the deteriorating condition of her arthritis, the Administrative Law Judge could reasonably infer that the plaintiff could perform tasks at the end of 1989, when her arthritis was only in its beginning stages, that she could still perform over two years later. *Rodriguez*, 647 F.2d at 222. The Administrative Law Judge's finding that the plaintiff retained the residual functional capacity to perform sedentary work as of her date last insured is thus supported by substantial evidence.

Accordingly, I recommend that the Secretary's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 31st day of May, 1994

David M. Cohen
United States Magistrate Judge

